BUNGA NOMINEES SDN. BHD.

v.

ABDUL JABBAR MAJID & 3 ORS.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' K.C. VOHRAH J
[NO. S1-22-562 OF 1992]
7 APRIL 1995

INJUNCTION: *Receiver and managers of third defendant applying for variation of interim injunction order - Injunction order obtained by plaintiff restraining receivers and managers from dealing with property - Whether there was an implicit provision for "liberty to apply" in the interim injunction order - Receivers and managers claiming change in circumstances upon which Court originally granted injunction order - Whether receivers and managers entitled to supplemental order.*

The third defendant was the developer of a property known as Sunrise Park (the property). The first and second defendants were receivers and managers appointed under a debenture entered into between the third defendant and a financier. The plaintiff was the purchaser of an apartment in the property under a sale and purchase agreement.

The plaintiff filed an action against the first three defendants and claimed, *inter alia* specific performance of the sale and purchase agreement. The plaintiff also obtained an interim injunction restraining the first three defendants or their servants or agents from disposing off the apartment or dealing with it until after trial of the action or until further order is obtained by the first two defendants for directions relating to the ownership affecting the disputed property.

The first two defendants applied to vary the injunction order so that they may dispose off or deal with the said property and argued that the injunction order was not a final order and that implicit in such order is a provision for "liberty to apply", relying on the case of *Light v. William West & Sons Ltd.* The first and second defendant further contended that a supplemental order can be made to cater for changes in circumstances upon which the Court originally granted the injunction order.

Held:

[1] The injunction order has two principal limbs. As for the first limb of the order, there is no question of the provision "liberty to apply" arising as the conclusion of the trial would decide matters finally. As for the second limb, there was no connection between the variation order sought for and the further order for directions contained in the second limb because the variation order sought for is not a necessary residual step that has to be taken to complete the terms of the second limb.

[2] The cases of *Ford Hunt, Scowby* and *Hall* would seem to show that where a party entitled to the benefit of an order of Court which is not final is deprived of its benefit either wholly or partly because the adverse party has taken advantage of circumstances which allowed him to act or omit to act on the order to the detriment of the party entitled to the benefit of the order, the Court may make a supplemental order which is not inconsistent with the original order and which necessarily and essentially complements the original order

and prevents the adverse party from benefitting from the changed circumstances to the detriment of the party entitled to the order.

[3] However, in the present case, there was nothing in the circumstances relied upon by the first two defendants to allow the making of the supplemental order requested for.

There has been no trial of the action and the first two defendants have not obtained directions from the Court as to matters relating to the ownership of the property under the order and there were no changed circumstances affecting the two principal limbs of the order. Whilst it was true that the two defendants did say that they had decided to recognise the individual purchaser as the ultimate beneficial owners of the units, no evidence was adduced to show the circumstances or criteria they acted upon to arrive at such a decision and in any event they did not have directions from the Court as regards ownership of the disputed property.

[4] To allow the supplemental order requested for would be to make an order which is inconsistent with and which amends the injunction order and this the Court cannot do.

[Application dismissed with costs].

Cases referred to:
Light v. William West & Sons Ltd. [1926] 2 KB 238 ***(refd)***
Penrice v. Williams [1883] 23 Ch D 353 ***(cit)***
Fritz v. Hobson [1880] 14 CH D 542 ***(cit)***
Ford Hunt & Anor. v. Raqbir Singh [1973] 2 ALL ER 700 ***(refd)***
Scowby v. Scowby [1897] 1 Ch 741 ***(refd)***
Hall v. Burnell [1911] 2 Ch 551 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 20 r. 11

For the respondent/plaintiff - S. Veronica; M/s. Dason & Co.
For the applicants/1st & 2nd defendants - S. Selvaratnam; M/s. Skrine & Co.

JUDGMENT

K.C. Vohrah J:

The 1st and 2nd defendants are receivers and managers of the 3rd defendant company and they apply for an order for them to be at liberty to dispose off or deal with an apartment in Sunrise Park, Jalan Ampang, Kuala Lumpur. The property is subject to a subsisting injunction obtained by the plaintiff, a company, on 16 December 1992 which restrains the two defendants from disposing off or dealing with the property.

The 3rd defendant, a company, was the developer of Sunrise Park (the Project) and faced financial difficulties in the course of its business. Asia Commercial Finance (M) Bhd. (ACF) had given a loan to the 3rd defendant company for the development of the project and a deed of debenture was made between them. On 8 July 1991, the 1st and 2nd defendants were appointed as receivers and manager of the 3rd defendant by ACF pursuant to powers conferred upon ACF by the debenture.

The plaintiff had bought from the 3rd defendant, pursuant to a sale & purchase agreement, an apartment, Apartment Unit No. M 807, in the project and has since paid RM90,810 towards the purchase price, the amount being 90% of the purchase price.

In October 1992, the plaintiff filed an action against the first three defendants and another and claimed, *inter alia*, for specific performance of the sale & purchase agreement entered into between the plaintiff and the 3rd defendant.

On 16 December 1992 the plaintiff obtained an injunction order from Ee Chin Seng JC, which restrained the first three defendants or their servants or agents from disposing off the apartment or dealing with it:

> until after the trial of this action or until such order as may be made by the High Court upon the application of the first and second defendants for directions as to matters relating to ownership affecting the disputed property...

Basis of Application to Vary Injunction Order

The basis for their application to vary the injunction order so that they may dispose off or deal with the said property, the 1st and 2nd defendants' argument, is that the injunction order earlier made is not a final order and that implicit in such order is a provision for "liberty to apply" and that, in addition, a supplemental order can be made to cater for changes in the circumstances upon which the Court originally granted the injunction order.

The first two defendants say that before the grant of the injunction but after they were appointed as receivers & managers of the 3rd defendant they discovered that out of the 50 units in the project, 35 appeared to be purchased by Colourways Sdn. Bhd. (Colourways) and also by other individual purchasers (including the plaintiff). The first two defendants then undertook the rehabilitation of the project which was made possible by a scheme established by the Government of Malaysia where soft loans were obtainable from financial institutions for the rehabilitation of abandoned housing projects.

The first two defendants say that since the grant of the injunction they, as receivers, came into possession of some books of the 3rd defendant (ordered by the Court in OS D1-24-51-1993 to be delivered to them) and they were in a better position to ascertain the interest of the individuals who had purchased the 35 of the 50 units of the project; and they decided to recognise the individual purchasers including the plaintiff as the ultimate beneficial owners of the respective 35 units of the 50 units. No evidence was, however, adduced to show the circumstances and criteria upon which they acted in order for them to make such a decision.

The first two defendants then sent notices of final billing to the individual purchasers including the plaintiff for the payment of the balance of the purchase price and for the delivery of vacant possession of their units to them. The plaintiff who received the notice (see AJM - 5 in encl. 27) "was agreeable to taking possession of the unit" but upon certain conditions one of which was for a letter of release in respect of Asia Commercial Finance in respect of the charge encumbering the said unit, another of the plaintiff's entitlement to damages for late delivery to be deducted from the balance remaining to be paid on the said unit and yet another for the plaintiffs to receive an indemnity for damages from the first two defendants in respect of any interference to its possession with regard to the claim by M/s. Colourways Sdn. Bhd. for ownership of the unit.

Correspondence was entered into between the solicitors of the plaintiff and solicitors of the first two defendants and a notice dated 14 September 1994 was sent by first two defendants, having failed to receive payment from the plaintiff, to the plaintiff terminating the sale & purchase agreement unless the money was paid within 30 days. The money remains unpaid and according to the defendants the sale & purchase agreement was terminated at the expiry of 30 days from the date of the termination notice and under the said agreement the first two defendants say, they acting as receivers, are allowed to re-sell the property. They say

that in view of the changed circumstances the injunction order should be varied to allow them as agents of the 3rd defendant, to dispose off the property or to deal with it in accordance with the contractual rights created by the agreement.

Slip Rule

At the outset I would like to point out that the application is not made out as a case falling under the slip rule, O. 20 r. 11, because there is no clerical mistake in the order nor is there an error arising from an accidental slip or omission.

Liberty to Apply

The defendants, however, say they rely on the principle that although liberty to apply is not expressly provided for in the Court order it is a case of a kind where liberty to apply is really or necessarily implied and the case of *Light v. William West & Sons Ltd.* [1926] 2 KB 238 is cited as authority.

In the *Light* case judgment was given for the plaintiff in the High Court by Rowlatt J for an amount to be ascertained on taking account between the parties with costs of the action. The referee took the account and ascertained the amount to be £83 10s. Under s. 11 of the County Courts Act 1919 the plaintiff was only entitled to costs on the County Court scale and not the High Court scale unless the Court was satisfied that there was sufficient reason for bringing the action in the High Court and the Court makes the order allowing costs on the High Court scale. The plaintiff went back to Rowlatt J who ordered cost to be taxed on the High Court scale. Rowlatt J held, *inter alia*, that he could make the order as liberty to apply was implied in his earlier judgment. On appeal to the Court of Appeal, Sargant LJ agreed that liberty to apply could be implied. Lord Hanworth MR did not reject the principle of liberty to apply but preferred another course of reasoning in affirming the order of Rowlatt J, the same reasoning that was adopted by the other appeal Judge, Scrutton LJ. In agreeing that there was implied liberty to apply Sargant LJ at 245 quoted Chitty J in *Penrice v. Williams* [1883] 23 Ch D 353 at 356 where his Lordship commented on the observation of Fry J in *Fritz v. Hobson* [1880] 14 Ch D 542, at 561, "According to my understanding of the practice ..., all orders of the Court carry with them *in gremio* liberty to apply to the Court". Chitty J corrected the observation by saying that that would not be the case generally, but would apply to cases where the order was not final but directed further steps to be taken. In such a case the Court has not lost its seisin of the matter and it has jurisdiction to make an order as to matters arising out of the taking of the accounts or inquiries. Sargant LJ was of the view in the case before him that since an account was ordered to be taken, that implied "liberty to apply".

In the case before me the Court would have seisin of the matter if the order is not final and there is a compelling nexus between the variation sought for and the matters explicitly set out in the order.

The injunction order has two principal limbs. The injunction restraining the 1st, 2nd & 3rd defendants from disposing off the plaintiff's apartment or dealing with it is alive:

(1) until after the trial of the action; or

(2) until such further order as may be made by the High Court upon the application of the 1st & 2nd defendants for directions as to matters relating to ownership affecting the disputed property.

As for the first limb of the order, there is no question of the provision "liberty to apply" arising as the conclusion of the trial would decide matters finally. As for the second limb I cannot see any connection between the variation order sought for and the further order for direction contained in the second limb because the variation order sought for is not a necessary residual step that has to be taken to complete the terms in the second limb. In fact there is no further order for directions as to matters relating to ownership affecting the disputed property.

On this ground alone I would refuse the application.

Supplemental Order due to Changed Circumstances

However, since the first two defendants have raised the matter of changed circumstances, I shall next deal with this issue. Reliance is placed on *Ford Hunt & Anor. v. Raqbir Singh* [1973] 2 ALL ER 700 where Brightman J was of the view that the Court has power to make a supplemental order, on the facts of the case before him, if and so far as the order was sought on new facts.

In that case the plaintiffs on 21 July 1972 obtained an order for specific performance of an agreement, the completion date to be 16 August. The order did not include a direction for an enquiry as to damages although, had the plaintiff then sought such an enquiry, a direction would have been included in the order. What had happened was that the defendant has neglected to execute a transfer as required by the order and therefore a further order was made on 7 December nominating a Master of the Supreme Court to execute the transfer, and also directing the defendant to deliver up vacant possession to the plaintiffs. That direction was disobeyed and the plaintiffs obtained possession about 5 weeks later. The plaintiffs were unable to obtain the building society finance which they had previously arranged for and instead had to borrow elsewhere thus incurring considerable costs to themselves.

What Brightman J underscored in the case when giving the supplemental order for the enquiry was that a vendor who seeks specific performance is entitled to damages for delay if he can prove that he has suffered damages and that if the plaintiffs had asked, an enquiry as to damages would have been added to the order for specific performance. He relied on *Scowby v. Scowby* [1897] 1 Ch 741 where a supplemental order was made.

Brightman J narrated the facts and commented on principles decided in *Scowby* as follows:

> In 1883 and 1884 a testator's estate became involved in administration and other proceedings instigated by a solicitor called Miller, whose purpose was to make costs. The parties to the administration proceedings included Mrs. Scowby and her brother, John Coward, who became trustees of the estate and were the tools of Miller. In 1887 the taxed costs of the parties to the administration proceedings, amounting to £3,500 and almost all payable to Miller, were directed to be raised by Mrs. Scowby and John Coward and paid into Court. In 1892 two further orders were made, displacing Mrs. Scowby and John Coward as trustees, but directing that certain costs should be paid to them. It later transpired that the £3,500 had not been paid into Court but had been used by Miller for his own purposes. The new trustees issued a summons to vary the 1892 orders so that the costs thereby directed to be taxed should be disallowed to Miller. Kekewich J held that he had no jurisdiction to vary the 1892 orders, but that he could make a supplemental order directing the present trustees not to make any payment to Mrs. Scowby or John Coward pursuant to the 1892 orders until the money directed by the 1887 order to be paid into Court should have been duly lodged. Coward appealed. The jurisdiction to make such a supplemental order was upheld, as it was grounded on facts not available at the time when the 1892 orders were made, and did not alter the 1892 order.

In other words the original orders were left intact and what was ordered in the supplemental order could have been made in the earlier orders if the facts had been available then.

Brightman J also relied on *Hall v. Burnell* [1911] 2 Ch 551. It was a vendor's action for specific performance. In 1911 Eve J made an order for specific performance. The purchasers failed to complete in accordance with the order. So the plaintiff moved for an order that the sale agreement should be rescinded and the deposit forfeited to the plaintiff. The order was made as asked. As was observed by Brightman J this was clearly a supplemental order based on facts occurring after the date of the previous order. Also to be noticed is that the original order was left intact and the supplemental order was a necessary and essential step because of the failure of the purchasers to complete in accordance with that order.

The three cases *Ford-Hunt, Hall and Scowby* would seem to show that where a party entitled to the benefit of an order of Court which is not final is deprived of its benefit either wholly or partly because the adverse party has taken advantage of circumstances which allowed him to act or omit to act on the order to the detriment of the party entitled to the benefit of the order, the Court may make a supplemental order which is not inconsistent with the original order and which necessarily and essentially complements the original order and prevents the adverse party from benefitting from the changed circumstances to the detriment of the party entitled to the order.

I cannot see anything in the circumstances relied upon by the first two defendants as allowing me to make the supplemental order requested for. The supplemental order that they are seeking is not in relation to an order for judgment but an order for an injunction restraining the defendants from disposing off the property or dealing with it until after trial of the action or until further order is obtained by the first two defendants for directions relating to the ownership affecting the disputed property. There has been no trial of the action and the first two defendants have not obtained directions from the Court as to matters relating to the ownership of the property under the order and I can see no changed circumstances affecting the two principal limbs of the order. While the two defendants say they had decided to recognise the individual purchasers of the 35 units including the plaintiff rather than Colourways as the ultimate beneficial owners of the units no evidence, as I had stated earlier, was adduced to show the circumstances or criteria they acted upon to arrive at such a decision and in any event they did not have directions from the Court (as they could have had under the order) as regards ownership of the disputed property. There being no directions what was it that the plaintiff did or omitted to do? I therefore cannot allow the supplemental order requested for as to make such an order would be to make an order which is inconsistent with and which amends the injunction order and the Court cannot do that.

To sum up, in my view, there cannot be implied in the injunction order liberty to apply nor can I make the supplemental order requested for.

Application is dismissed with costs.